IN THE

Supreme Court of the United States

TERM—1942

FRANHAM DISTRIBUTORS, INC.,
Petitioner,
against
NEW YORK WORLD'S FAIR 1939 INCORPORATED AND SWIFT & COMPANY,
Respondents.

BRIEF IN SUPPORT OF PETITION

OPINIONS BELOW

The opinion of the Circuit Court of Appeals for the Second Circuit is reported in 124 Fed. (2) 82.

No opinion was rendered by the United States District Court for the Southern District of New York.

JURISDICTION AND STATEMENT OF THE CASE

The jurisdictional basis for the petition and statement of the case are stated in the petition and for the sake of brevity are not repeated herein.

SPECIFICATION OF ASSIGNED ERRORS TO BE URGED

It is intended to urge the following errors:

1. It was error to hold that the trial judge properly excluded evidence of conversations between the president of the plaintiff corporation and the executive vice-president, Director of Exhibits and Concessions and attorney for the defendant World's Fair.

2. It was error to hold that the trial judge properly excluded a portion of the deposition of Grover A. Whalen, president of the defendant World's Fair, describing the nature of the authority of the attorney for the World's Fair.

3. It was error to hold that the trial judge properly excluded an affidavit of the vice-president of the defendant World's Fair, in which was set forth the nature and scope of his duties as such executive vice-president.

4. It was error to fail to modify the order directing the dismissal of the cause of action herein against the defendant Swift & Company for inducing breach of an existing contract without prejudice and not upon the merits, so as to permit the bringing of an action against Swift & Company for malicious prevention of plaintiff's execution of a contract with the defendant-appellee New York World's Fair.

ARGUMENT

I.

THE TRIAL JUDGE, IN EXCLUDING TESTIMONY OF CONVERSATIONS BETWEEN REPRESENTATIVES OF PLAINTIFF CORPORATION AND THE DIRECTOR OF EXHIBITS AND CONCESSIONS, THE EXECUTIVE VICE-PRESIDENT AND THE MEMBERS OF THE FIRM OF ATTORNEYS FOR THE DEFENDANT WORLD'S FAIR, THEREBY ERRONEOUSLY DECIDED AS A MATTER OF LAW, A QUESTION WHICH SHOULD PROPERLY HAVE BEEN RESERVED FOR THE CONSIDERATION OF THE JURY AS A QUESTION OF FACT.

It is a well-settled rule of law that a corporation must act through its officers or agents. Agents who are not expressly authorized to bind their corporation contractually, may yet bind it if they have been held out as apparently authorized to bind the corporation in a contract, and parties with knowledge of that fact, have dealt with them in reliance thereon.

No resolution of a Board of Directors of a corporation is necessary to bind it for the acts of its agents (*Hooker* v. *Eagle Bank,* 30 N. Y. 83, 85-86).

The validity of an agreement to lease a concession is not dependent upon the passage of a formal resolution authorizing such agreement (*Lyon* v. *West Side Transfer Co.,* 132 App. Div. 777, 779; *Young* v. *U. S. Mortgage & Trust Co.,* 214 N. Y. 279, 285).

If a contrary rule were to be adopted, then "corporations would be mere traps for the purpose of deceiving the

unwary and be the means of using the charter conferred by the state as an instrument of fraud" (*Tyler* v. *Anglo-American Sav. Assoc.*, 30 App. Div. 404, 406-8, 409; *Norton* v. *Genessee Nat. Sav. Assoc.*, 57 App. Div. 520, 522-3; *Bathbun* v. *Snow*, 123 N. Y. 343, 349; *Leonardi* v. *Times Sq. Auto Co.*, 127 App. Div. 192 at page 193.

A. Testimony of Conversations Between Representatives of Plaintiff Corporation and Representatives of Defendant World's Fair, Concerning the Making of the Alleged Oral Concession Agreement, Were Admissible as Part of the *Res Gestae*.

It is also a well-settled rule of law that conversations between one contracting party and an alleged agent of the other contracting party, are admissible provisionally as part of the *res gestae*, subject to connection by subsequent proof of express or implied authority of the agent to bind his principal (*Stecher Lithographic Co.* v. *Inman*, 175 N. Y. 124, 127; *Sollows* v. *McCann Erickson Inc.*, 27 Fed. Sup. 491 (Dist. Ct. N. Y. 1939)).

Upon these propositions of law Dean Wigmore, in the latest edition of his Treatise on Evidence, says (4 Wigmore, Sec. 1078):

> "It may be noted that the fact of agency must of course be somehow evidenced before the alleged agent's declarations can be received as admissions; and therefore the use of the alleged agent's hearsay assertions that he is an agent would for that purpose be inadmissible as merely begging the question. *Nevertheless they might be received provisionally as verbal acts indicating that he was acting on another's behalf, not his own, leaving it to subsequent proof to establish his connection as agent*

with the present party. And of course the agent's statements, though not receivable as such, might become admissions as self-contradictions of his testimony upon the stand. And of course nothing prevents the alleged agent from testifying upon the stand to the fact of his agency; for here his testimony is not offered as an admission."

Applying this rule to the facts of the instant case it is clear that the trial judge erred in excluding conversations between the president of the plaintiff corporation, Louis Golde and Maurice Mermey, member of the Pre-Qualifications Board, and the Director of Exhibits and Concessions of the defendant World's Fair (356). It was also error to exclude conversations between the Goldes and Commander Flanigan, Executive Vice-President of the Fair and also a member of the Pre-Qualifications Board, and James S. Hemingway, member of the firm of Lord, Day & Lord, with offices at the legal department of the World's Fair, their client. These conversations, as appears from the opening of plaintiff's counsel, were material to establish plaintiff's cause of action. They of course, fit the category of "Verbal Acts" referred to by Dean Wigmore in his Treatise on Evidence. Plaintiff sought to establish through these conversations and the acts of the officers of the defendant World's Fair that its bid was accepted and a contract embodying the bid formally and completely prepared, which was done by Grover A. Whalen, President of the defendant World's Fair, stated in his examination before trial, "only in the event that bids had been received and *accepted* by the corporation" (426). In accordance with Judge Bondy's decision on the motion for Summary Judgment, which was the law of the case, such an acceptance could so be made

and could become a binding contract notwithstanding the failure and refusal thereafter of the defendant World's Fair to execute the formal written instrument (690).

In excluding testimony of those conversations, the trial judge usurped the function of the jury and decided that there was no proof that Mermey, Flanigan or Hemingway were authorized, expressly or apparently, to act for the defendant World's Fair. In affirming the ruling of the trial judge (see opinion, p. 84), it is urged that the Circuit Court committed error.

Dean Wigmore, in Volume 6 of his Treatise, states that the question of the admissibility of declarations of an agent as binding upon his principal is a question of substantive law and not a rule of evidence (6 Wigmore, Sec. 1769). In so stating, he cites Prof. James Bradley Thayer (Amer. Law Rev. XV, 80), as follows:

> "The term *'res gesta'* is freely used in another class of cases where the specific question is whether the parties to the suit shall be affected with responsibility for the declaration of another; not merely whether it may be used as evidence against him, but whether it shall be so used as having been brought home to him, and whether he shall be chargeable with it as if it were his own. When the inquiry is whether the utterance of an agent * * * is receivable against the party, and it is said, in the case of the agent, that it must have been made in and about the business on which the agent was employed, and while actually engaged in that business, * * *— in such cases it is common to express this idea by saying that the declaration must be made as part of the *'res gesta'*; and if it is not so made, it is deemed to be *'res inter alias gesta'*. *Now it is obvious, on a*

*little reflection, that to settle this question adversely to the admissibility of that which is offered in evidence is really to settle a question in the law of agency * * *—a question in substantive law."*

In other words, by excluding these conversations, the court decided that there was insufficient proof of authority of the alleged agents to bind the defendant World's Fair to warrant submission of the question of agency to the jury.

Upon the appeal, the Circuit Court of Appeals agreed with the trial judge that the alleged agents were not shown to have had authority to accept the bid (see p. 84 of opinion). In so ruling, we contend it affirmed two errors committed by the trial court: (1) it took from the jury the question of agency, a question of fact expressly reserved to it by the decision of the courts; (2) it decided the question of agency in favor of defendant when there was sufficient evidence from which it might have been inferred, as was the fact, that Mermey, Flanigan and Hemingway, each or all of them, acted within the scope of their employment in their dealings with the plaintiff.

The question of agency "is ordinarily a jury proposition which should not lightly be taken from them by the court where there is any substantial evidence, direct or circumstantial, tending to support the agency relied upon" (*Smith* v. *Texas Company,* 149 So. 585, 586).

Only, "where the material facts from which it (the agency) is inferred are not in dispute and only one reasonable conclusion can be drawn therefrom" is the question of agency one of law for the court to decide without submission to the jury (3 C. J. S. 325-326).

Mott v. *Consumers' Ice. Co.*, 73 N. Y. 543, 550;
Courtney v. *Baker*, 60 N. Y. 1, 5;
Gaillard Realty Co., Inc. v. *Manhattan Brass Co., et al.*, 238 App. Div. 84, 86.

In *Conant* v. *American Rubber Tire Co.*, 48 App. Div. 327, plaintiff was seeking to recover on an advertising contract signed "J. F. Aldrich, manager Columbiana Pneumatic Wagon Wheel Company". Defendant, in seeking to escape liability, asserted that Aldrich had no authority to sign this contract. Plaintiff called as his witness the president of the defendant corporation who testified that,

> "Aldrich was an employee, not an officer of the defendant, that he acted in a limited capacity as manager his duties being to solicit orders, oversee workmen and shipments, and make such little purchases as might be necessary to run the business from day to day, but that he had no authority to make a contract and was expressly prohibited from making such a contract" (pp. 328-9).

At the close of the evidence the court held, as a matter of law, that the contract was within the apparent scope of the authority of Aldrich, as manager of the defendant. On appeal, the Appellate Division reversed, saying (p. 330):

> "The trial court erred, we think, in holding as a matter of law that the defendant was bound by the contract. The question of ratification was, concededly, a question of fact for the jury. Ordinarily, the question whether a certain act is within the general scope of a servant's employment is for the jury to determine (*Mott* v. *Consumers Ice Co.*, 73 N. Y. 543, 550). The evidence in this case was not sufficient for the court to hold as a matter of law

that the contract was within the apparent scope of the employment of Aldrich."

There we have the reverse situation from the case at bar. In the case cited, no question was ever raised concerning the admissibility of evidence, showing the nature and extent of the authority of the alleged agent to act for his principal, but on the basis of the admitted evidence the court held that the defendant's manager had authority to bind him contractually. In the case at bar, not only was the plaintiff prevented from testifying concerning conversations had with the alleged agents to show the contract or to show the apparent scope of these agents' authority, but also an admission by the defendant World's Fair through its president, contained in his examination before trial, describing the nature of the authority of Hemingway to act for the corporation, was excluded.

Similarly, in the case at bar appellant urges that the court erroneously held, as a matter of law, that these agents were not authorized to bind the defendant World's Fair in their conversations with plaintiff's representatives. The error of the court here was even more serious, because not only did it decide the question of agency in favor of the defendants, in the face of admissions by the defendants' attorneys concerning the scope of the authority of Mermey, Flanigan and Hemingway, but the court went further in excluding any attempt on the part of the plaintiff to introduce evidence of the conversations between the plaintiff's representatives and the alleged agents, which, from the opening of plaintiff's counsel would have been some proof that Mermey, Hemingway and Flanigan were held out by the World's Fair as apparently authorized to bind the Fair in connection with its concession agreements.

Had the trial court admitted plaintiff's evidence of the conversations between its president and Hemingway, one of the counsel of the defendant World's Fair, and permitted the jury to consider the fact that Hemingway himself had prepared the contract for the concession, to be executed by the plaintiff and the defendant Fair, and to further weigh the testimony of the events which occurred at its legal department when all parties met to sign the contract, it would at least have established the conduct of these responsible and high officials of the defendant World's Fair, the circumstances under which they acted in its behalf and what they did in performance of their duties in behalf of the Fair in the acceptance of the plaintiff's bid. This evidence the jury could have considered in its determination of the question whether these officials had authority, or were held out with authority, to bind the defendant World's Fair in its relations with the plaintiff. In holding that the trial judge acted well within his discretion in excluding this testimony, it is urged that the Circuit Court committed error particularly in view of its own statement in the opinion (See p. 85):

> "Often it is better to admit evidence tentatively upon assurance that its competency will appear * * *"

B. Established Practice Justified the Admission of Proof of the Alleged Oral Agreement First and Consideration of the Question of Authority at a Later Stage of the Trial.

Decisions of the Supreme Court of the United States indicate that the practice regarding the admission of decla

rations of an agent is not as strict as the trial judge in the instant case, held.

In *First Unitarian Soc. of Chic.* v. *Faulkner, et al.,* 91 U. S. 415, an action was brought to recover compensation for work, labor and services rendered by architects at the request of the pastor of the appellant church. The contention was made that the pastor was not authorized in any way by the church to employ appellees as architects. The architects sought to introduce into evidence certain declarations of the pastor to the effect that he was so authorized. Objection was made by the attorney for the church, and the respondent's attorney stated to the court that they expected to prove that the pastor acted as the agent of the society and that the society had acquiesced in his acts. Upon that understanding the objection was overruled, the court remarking:

> "* * * the testimony would become material if the plaintiffs should subsequently give evidence to prove the agency of the pastor at the time of the interview with the business partner of the plaintiffs when the plans were submitted" (p. 417).

The architects recovered a verdict and the church appealed, contending that the court erred in admitting these declarations and admissions. The Supreme Court, through Mr. Justice Clifford, in affirming the judgment of the trial court, said:

> "Declarations of the pastor were not competent evidence, unless it was proved that he was the agent of the society, and that the declarations or admissions were made in respect to matters within the scope of

> his agency. *But it is not absolutely necessary that the proof of agency in every such case should be first introduced.* Except in special cases, it is the better practice that the foundation, in such a case, should be laid before the declarations or admissions are admitted; *but it is competent for the presiding judge, if in his judgment the ends of justice require it, to relax the rules of practice, and to admit the evidence offered before the proper foundation for the admissibility of the same is laid, if he is well assured by the party offering the evidence that the agency in question will be subsequently proved*" (p. 417).

In *Bank of the Metropolis* v. *Guttschlick,* 14 Pet. 19, 39 U. S. 335, 340 (cited with approval in *First Unitarian Society* v. *Faulkner, supra*), an action was brought on an agreement in writing by which the defendant had purchased a plot of ground in the City of Washington from the plaintiff bank executed by its president and cashier. The agreement was offered in evidence and received, although no evidence was given showing the authority of the agents who executed it to bind the bank. This failure was assigned as an error by the appellant. In dismissing this objection, the court said (p. 28):

> "Assuming, *argumenti gratia,* as we have before done as to this point, that the transaction was such that an authority was necessary to be proven, the objection resolves itself simply in a question of the order in which evidence was to be given. We think that there is nothing in it. It was as competent for the party to prove the authority after as it was before, giving the agreement in evidence."

C. The Trial Judge, in Dismissing the Complaint, Paid No Heed to the Opinion of Judge Bondy, Denying Defendant World's Fair's Motion for Summary Judgment, Which Was the Law of the Case.

Having refused to allow plaintiff to prove its causes of action, the trial court dismissed plaintiff's complaint for failure to establish a *prima facie* case (461). In his opinion dismissing the complaint, the trial judge showed clearly the confusion that pervaded his mind in ruling as he did upon the offers of proof. First of all, he stated that he "accepted as the law of the case the decision of Judge Bondy that an oral contract could be made" (458, 689-690). Then he referred to subdivision 7 of the "Information for Bidders", the document prepared by counsel for the defendant World's Fair for bidders for concessions, which stated in part,

> "the acceptance of a proposal will be a notice in writing signed by a duly authorized representative of the corporation, and no other act of the corporation shall constitute an acceptance of the proposal" (459).

Judge Bondy, in construing this document had stated in his opinion denying defendant World's Fair's motion for summary judgment, which the trial judge had accepted as law of the case, that,

> "It appears that this provision for written notice of acceptance was inserted by the defendant for its own advantage in the concession documents, which were part of plaintiff's bid. But apart from any question of waiver, if the defendant's oral acceptance of the bid be deemed a defective acceptance, it may be considered a counter-offer to which plaintiff manifested its assent" (689).

Having thus accepted Judge Bondy's opinion as law of the case, the trial judge then continued (460-1):

> "Surely it is contemplated *that a written binding agreement must be signed before either side shall be bound. No such agreement was signed* * * *
>
> Really from the opening of plaintiff's counsel itself, it appears plaintiff knew they had no contract because they knew that *it had to be in writing.*"

It is patent that the trial judge had concluded that unless the plaintiff proved a written contract, it had no case.

This the Circuit Court, in its opinion, did not follow, stating at page 85, that,

> "* * * acceptance did not as a matter of law have to be in writing."

However, by the trial judge's ruling, all evidence of oral conversations concerning the making of the alleged oral agreement between the representatives of the plaintiff and the representative of the defendant World's Fair was excluded.

Plaintiff was prevented from placing before the jury, any evidence of the conduct of the parties, whether by act or word, which would tend to prove the contract alleged in the complaint. This ruling was in direct contravention of Judge Bondy's opinion, which, under the established practice, sanctioned by the Supreme Court of the United States, the trial judge was bound to accept as law of the case, unless it was perfectly clear that the former decision was wrong in law, and that to follow its rule would work injustice to the parties (*Davis* v. *Davis*, 96 Fed. (2d) 512, 515, aff'd 305 U. S. 32; *Messenger* v. *Anderson*, 225 U. S. 436, 444; *King* v. *West Virginia*, 216 U. S. 92, 100).

To the same effect see the New York rule, as established by: *Henry* v. *N. Y. Post Inc.,* 168 Misc. 247, aff'd no op., 255 App. Div. 973, aff'd no op., 280 N. Y. 842; *Aldrich* v. *Newburgh News Printing & Pub. Co.,* 70 Misc. 126, 127; *Title Guar. & Trust Co.* v. *Hoffheimer,* 170 Misc. 691.

Then perhaps, realizing his error, the trial judge continued by paying lip-service to the opinion of Judge Bondy (461-2):

> "Of course I appreciate the fact that an oral contract may be binding even though the parties may say that 'we intend to put it in writing,' and even without putting it in writing the contract may nevertheless be binding. *However, in this case there is no evidence that the parties with whom the plaintiff's representatives had conversations could bind the World's Fair corporation.*
>
> The motion to dismiss is granted."

The latter part of this statement, "there is no evidence that the parties with whom the plaintiff's representative had conversations could bind the World's Fair corporation", was made without basis in fact. The evidence which constitutes a sufficient preliminary showing of authority on the part of representatives of the World's Fair to act for this defendant, is set forth as follows:

1. MAURICE MERMEY was a member of the Pre-Qualifications Board (353); he was Acting Director of Exhibits and Concessions from December 31, 1937 to September 9, 1939, which includes February 1 and 2, 1938, the time when the alleged oral contract was entered into (354-5); he had power to sell all domestic exhibit space available for sale by the World's Fair (356); it was among his duties to plan and develop the plans for

various types of concessions held at the Fair (356), and to negotiate the various contracts for the concessions and exhibits (413).

2. COMMANDER HOWARD A. FLANIGAN was Administrative Assistant to the President, and subsequently became Executive Vice-President of World's Fair, his duties remaining substantially the same as before (365). He had general supervisory charge of the hamburger and frankfurter concession, which included the sale of coffee, tea and milk, and also, as Chairman of the Concessions Pre-Qualifications Board, he had a most intimate and executive control over this concession (368). The affidavit submitted by the defendant World's Fair in support of its motion for Summary Judgment, was the affidavit of Comm. Flanigan. In said affidavit, Flanigan described his authority as follows (80-81):

> "I am the Vice-President of the New York World's Fair 1939 Incorporated, one of the defendants in the above entitled action.
>
> On or about February 2, 1938, I was the Administrative Assistant to the President of the Fair and in that capacity was *responsible for the taking and consideration of bids for the concession involved in this action.* Accordingly, I am familiar with the circumstances surrounding the taking and rejection by the Fair of the plaintiff's bid."

This portion of the latter affidavit was sought to be introduced into evidence as an admission against the World's Fair, made by this defendant through its Vice-President, and also as an admission against Flanigan personally, of the nature and scope of his authority in accordance with Wigmore's Rule (4 Wigmore, Sec. 1078), but was excluded by the trial judge (404-9).

3. JAMES S. HEMINGWAY was a member of the law firm of Lord, Day & Lord, the attorneys for and with

offices at the legal department of the defendant World's Fair (337). It was among his duties in the Concession Department, to render sundry legal services, including the preparation of concession agreements (338). According to the testimony of Grover A. Whalen, President of the defendant World's Fair, given at his examination before trial, "It was in the line of Mr. Hemingway's responsibility to draw these (concession agreements) immediately after bids were received and accepted by the corporation (426). Plaintiff's counsel sought to introduce this testimony as an admission by the highest ranking officer of the defendant World's Fair of the nature and scope of the duties of a subordinate. But, this offer of proof was also excluded by the trial judge (426).

Substantially the same statement of facts as plaintiff offered to prove at the trial was set forth in the affidavit of Louis Golde, submitted in opposition to the motion by defendant World's Fair, for Summary Judgment, and was before Judge Bondy for his consideration, on that motion. Judge Bondy's opinion, in deciding this motion, reveals a sharp contrast from the ruling and the opinion of the trial judge in dismissing the case. Judge Bondy stated (690):

> "Moreover, a jury, crediting plaintiff's version of the discussion between the parties on February 2, 1938, might find that at that time the parties agreed upon all the terms of the agreement and accordingly entered into a binding contract, notwithstanding their failure to execute a formal written instrument."

This statement of the law is supported by a pronouncement of this Court, in *Martin* v. *Webb,* 110 U. S. 7 (cited

most recently with approval in *Kansas Educational Assn.* v. *McMahan,* 76 Fed. (2d) 957, 960). In that case this Court affirmed the decree below adjudging the acts of a cashier as binding upon a bank, stated at pages 14-15:

> "His authority (as cashier, to act for the bank) may be by parol and collected from circumstances. It may be inferred from the general manner in which, for a period sufficiently long to establish a settled course of business, he has been allowed, without interference, to conduct the affairs of the bank. It may be implied from the conduct or acquiescence of the corporation, as represented by the board of directors. When, during a series or years or in numerous business transactions, he has been permitted, without objection and in his official capacity, to pursue a particular course of conduct, it may be presumed, as between the bank and those who in good faith deal with it upon the basis of his authority to represent the corporation, that he has acted in conformity with instructions received from those who have the right to control its operations. Directors cannot, in justice to those who deal with the bank, shut their eyes to what is going on around them."

Applying this rule to the case at bar, there was sufficient preliminary evidence of the authority of Maurice Mermey alone, to act for the World's Fair, to suggest a similar holding. Clearly, the question of his authority to enter into a concession agreement such as the one in the case at bar, should have been permitted to the jury. Indeed, from the decision above quoted, a jury might well have found that Mr. Mermey's authority to accept the plaintiff's bid for the hamburger and frankfurter concession might have

been "inferred from the general manner in which, for a period sufficiently long to establish a settled course of business he has been allowed without interference to conduct the affairs of the" World's Fair (*Martin* v. *Webb,* 110 U. S. 7, at p. 14).

See, also:

Sollows v. *McCann Erickson, Inc.,* 27 Fed. Supp. 491, 492 (D. C. N. Y. 1939).

D. The Burden to Show Lack of Authority Was on Defendant World's Fair.

Not only was the admitted evidence sufficient to satisfy the requirement of a preliminary showing of authority so that testimony concerning the making of the oral agreement between the representatives of the plaintiff and the representatives of the defendant World's Fair should have been admitted, but under the decisions of the highest New York courts, the burden of showing lack of authority on the part of the individuals, apparently acting on behalf of the defendant World's Fair, was upon the said defendant.

In *Lyon* v. *Westside Transfer Co.,* 132 App. Div. 777, the court said, at page 780:

> "Where a contract is one which the directors had power to authorize their officers to make, or to ratify it after it had been made, the burden was on the persons denying the contract to show that it was not authorized or ratified by the board:

See, also:

Patterson v. *Robinson,* 116 N. Y. 193.

In the case at bar, it can scarcely be contended that it was not within the power of the Board of Directors of the World's Fair to authorize Mermey, Flanigan and Hemingway to bind this defendant in a hamburger and frankfurter concession agreement, or to ratify such an agreement if made without express authority. Therefore, the burden was on the defendant World's Fair to show that its agents were not so authorized, and it is submitted that this defendant has not met its burden by the interposition of a bare-faced denial of authority.

II.

THE DISMISSAL OF THE COMPLAINT AS AGAINST DEFENDANT SWIFT AND COMPANY WAS PREDICATED UPON THE ERROR OF THE TRIAL JUDGE IN RULING UPON THE PLAINTIFF'S OFFERS OF PROOF.

The action against Swift and Company was predicated upon an intentional interference with contractual relations entered into between the plaintiff and the defendant World's Fair. Before the plaintiff could recover against the defendant Swift and Company for this alleged tort, it must have, perforce, established the contractual relationship between itself and the defendant World's Fair. (*DuRoy & LeMaistre Inc.* v. *Gillmore,* 246 App. Div. 37; aff'd no op., 272 N. Y. 454.)

It is submitted that because of the error of the trial judge in ruling upon the plaintiff's offers to prove the oral agreement between itself and World's Fair, which have been adverted to under I, *supra,* it became impossible for the plaintiff to establish the oral contract alleged in the com-

plaint, and therefore, its cause of action against the defendant Swift and Company, terminated prematurely.

From the opening of the plaintiff's counsel, it appeared that the case against Swift and Company was strongly buttressed by documentary evidence, consisting of telegrams and letters between Harvey Gibson, a member of the Executive Committee of the defendant World's Fair, and the Treasurer and Executive Vice-president of the defendant Swift and Company, substantiating plaintiff's claim of intentional interference with contractual relations.

Moreover, in denying plaintiff's petition for a rehearing, the Circuit Court, in failing to modify its order, directing the dismissal of the cause of action herein against the defendant Swift and Company, without prejudice, and not upon the merits, prevented the plaintiff from bringing an action against Swift and Company for malicious prevention of plaintiff's execution of a contract with the defendant World's Fair. In so doing, it is urged that the Circuit Court committed error.

Thus, it will be seen that the rulings of the trial judge had the effect of allowing the defendant World's Fair to avoid its contract liability with the plaintiff, and thus defendant Swift and Company was permitted to obtain the dismissal of the plaintiff's case against it, without presentation of the plaintiff's evidence of the alleged tort. The rulings of the trial judge prevented the plaintiff from proving its contract, and from proving the tort of intentional interference with that contract.

Therefore, had proof of the oral contract between plaintiff and the defendant World's Fair, been admitted, plaintiff could have proceeded to establish its case against the defendant Swift and Company for interference with its contractual relations with the Fair.

CONCLUSION

Not only did the rulings of the trial judge work a great injustice to the rights of the plaintiff in this action, but its effect transcends this litigation and places in jeopardy, the rights of all persons who deal with large corporations through their titled officials. If the judgment of the trial court is to become law, a corporation will be permitted to insulate itself from contract liability by allowing its titular heads to hold themselves out as apparently authorized to bind the corporation in contracts but always reserving for itself, the privilege of breaching the contract and of defeating the efforts of the party, relying thereon, merely by coming into court and objecting to proof of the contract, on the ground of lack of authority. On the other hand, should the corporation feel that the contract is advantageous it may obtain enforcement of it to the letter, by claiming that their agents were duly authorized. This provides discouragement to all those who, relying upon handsome offices and high-sounding titles, risk their wealth, time, and effort, in negotiating for future commitments, for, although those in the position of this plaintiff may become obligated to carry through their agreement, those in the position of the defendant World's Fair, may avoid their obligation with impunity.

Similarly, those who intend interfering with apparent contractual relations entered into between large corporations, may rest secure in the knowledge that they will not be called to account for their tortious acts unless a written contract signed and sealed on behalf of the corporation by someone higher in authority than the Executive Vice-president is produced at the trial.

FOR THE REASONS STATED IN THE PETITION AND IN THIS BRIEF, IT IS RESPECTFULLY SUBMITTED THAT THE APPLICATION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED.

Dated: New York, April 6, 1942.

Respectfully submitted,

ALEXANDER PFEIFFER,
Attorney for Petitioner,
Franham Distributors, Inc.